DOES THE PHILIPPINE REPUBLIC HAVE A CONSTITUTION?

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With the Philippine Republic now more than twenty years in existence and with a solid body of constitutional jurisprudence already accumulated in Philippine law reports, one may well be accused of bordering on the impertinent for asking the question raised in the title of this paper. But the justification for the question is both historical and legal and reaches back, first, to three full weeks of inconclusive debate that taxed the oratorical powers of the delegates to the Philippine Constitutional Convention and, second, to the debates in the United States Congress over two successive Philippine independence bills. More precisely, the question that agitated the delegates to the Philippine Constitutional Convention which assembled in Manila on July 30, 1934, was whether the Philippine Independence Law, popularly known as the Tydings-McDuffie Law, [1] authorized the convention delegates to draft a constitution not only for the Philippine Commonwealth but also for the Philippine Republic that was to succeed the Commonwealth automatically after ten years.

This paper will study both convention debates and the legislative history of the Tydings-McDuffie law and then offer some tentative observations.

CONVENTION DEBATES

What triggered the controversy was an innocent looking resolution presented by Delegate Camilo Osias on August 28, 1934. The resolution read: [2]

> RESOLUTION EXPRESSING THE SENSE OF THE CONSTITUTIONAL CONVENTION THAT THE CONSTITUTION TO BE DRAFTED SHALL BE A CONSTITUTION FOR THE PHILIPPINE COMMONWEALTH AND THE PHILIPPINE REPUBLIC TO BE KNOWN AS "THE CONSTITUTION OF THE PHILIPPINE ISLANDS.
>
> *Whereas,* it is necessary to define the scope of the Constitution to be framed for the guidance of the members of the various Committees and of the Constitutional Convention;

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[1] Act Mar. 24, 1934, ch. 84, Sec. 1, 48 Stat. 546.

[2] 1 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE PHILIPPINES (hereafter, J. PHIL. CONST. CONV.) 201 (1961). This printed edition of the Journal is edited by Vicente J. Francisco and is currently being published in installments by the East Publishing Company, Manila. Although the Convention took place in 1934-35, the dates in the citations are dates of publication. The volume numbers cited are those found on the outside of bound volumes and not those of individual numbers.

> *Whereas,* the demands of economy and statesmanship require that a Constitution be now made for the Government of the Commonwealth and for the government of the Republic upon the advent of Independence;
>
> *Whereas,* the Independence Act authorizes the mandatory provisions to be placed in an ordinance appended to the Constitution;
>
> *Whereas,* the same Independence Act provides that the independent government shall be proclaimed under the Constitution in force at the time of the advent of independence; *Now, therefore, be it*
>
> *Resolved,* That the Constitutional Convention now assembled draft and formulate a Constitution for the Philippine Commonwealth that is to be semi-sovereign and semi-independent and for the Philippine Republic that is to be sovereign and independent, the same to be known as "The Constitution of the Philippine Islands."
>
> *Resolved, further,* That the various Committees of the Convention be furnished copies of this resolution for their guidance.

Delegate Miguel Cuaderno reports that the resolution was introduced to give the delegates something to talk about while the various committees worked on the preliminary drafts; but the "filler" blossomed into a life-sized controversy that took up the time of the convention from August 28, 1934 to September 19, 1934. [3] Roughly, three different positions battled for recognition: (1) That the Tydings-McDuffie Law authorized the drafting of a constitution both for the Commonwealth and for the Republic and that approval of the Osias resolution was imperative; (2) That the Tydings-McDuffie Law was a clear enough guideline and that the resolution was unnecessary and even dangerous; and (3) That the Tydings-McDuffie Law authorized the drafting of a constitution only for the Commonwealth. The ensuing debates carried clearly political and emotional overtones; but the primary legal issue, which is the main interest of this paper, was clearly delineated: What authorization did and could the Tydings-McDuffie Law give? The protagonists in the debate sought to answer the question on the basis both of general constitutional theory and of the text of the Tydings-McDuffie Law.

GENERAL CONSTITUTIONAL THEORY

Delegate Manuel A. Roxas, former Speaker of the House of Representatives and recently reelected to the same House at the time of the convention and destined to be the last President of the

[3] Reference should be to a book by Cuaderno, a delegate to the convention, which was not available for citation at the time of writing.

Commonwealth and first President of the Republic, stood out as the chief constitutional theoretician on the side of the Osias resolution. The debates on August 29, 1934, opened with a lengthy disquisition by Roxas. He argued that a constitutional convention, such as the one in session, was "the product of American philosophy of law." Its nature, therefore, and its powers, he said, were to be sought in American constitutional theory. In American theory, he continued, a constitional convention is not sovereign "but is nothing more or less than a committee, a special committee chosen by the people who are about to draft a constitution, to formulate the instrument upon which their approval will be sought." The limitations of its powers are precisely the limitations of its principal, the people. "We can [therefore] formulate a Constitution that the people of the Philippine Islands have a power under the law to adopt." [4]

"Now, what are the powers of the people?" Roxas answered that the power of the people given by Section 1 of the Tydings-McDuffie Law was to adopt a "constitution," an instrument which, Roxas continued, has a very definite meaning in American law.

> What is the first characteristic of an American Constitution? First, that it derives its authority from the people. Second, that it is permanent, that is of the essence of the instrument as conceived in the United States of America. . . . If the Constitution derives its power from the people, the question may be asked: From whom do we derive this power in the Constitutional Convention — from the American Congress or from the people? My reply is, from the people. The American Congress has given us the right to govern — sovereignty, as this has been defined by ancient and modern writers. We cannot talk of a Constitution in accordance with American philosophy of Constitutional Law without presupposing behind it sovereignty in the people that approve it. . . [5]

But, if sovereign, how explain the limitations imposed by the Tydings-McDuffie Law?

> The reply is evident. The American Congress, in the Independence Act, has in effect told the Filipino people. You have the right to govern yourself. You can adopt and formulate a Constitution for your government, but during the intermediate period and until complete withdrawal of American sovereignty from your country, your sovereignty will be restricted by the following mandatory provisions. These restrictions are imposed by Congress, but, Mr. President, to prove that a Constitution must exclusively be the work of the people, Congress requires that the Constitution must contain these mandatory provisions. That is to say, the people of the Philippine Islands by their votes must accept those mandatory provisions, otherwise the whole process provided in the Independence Law would fail and lapse. [6]

[4] 1 J. CONST. CONV. 221 (1961).

[5] *Ibid.*

On interpellation by Delegate Ruperto Kapunan, Roxas further explained the sovereignty he envisioned under the proposed constitution thus:

> La teoria moderna admite la divisibilidad de la soberania; por ejemplo, Cuba redacto su Constitucion a pesar de la Enmienda Platt. Los Estados norte-americanos redactaron su Constitucion a pesar de que su soberania estaba limitada por las disposiciones de la Constitucion federal, es decir, los tratadistas y juristas de hoy mantienen que la soberania popular no necesita ser absoluta; que con frecuencia una entidad politica o un Estado puede exister aunque su soberania este limitada. Puede haber diversas razones respecto al sujeto a la materia sobre que se ejerce la soberania; pero respecto a esa materia es absoluta la soberania, y debe ser asi; mas para que un Estado pueda ser soberano. no necesita serlo absolutamente.
>
> . . . Somos una autonomia hoy, bajo la Ley Jones; es decir, ejercemos el privilegio de governarnos a nosotros mismos, bajo ciertas limitaciones; pero no somos soberanos, precisamente porque las facultades de gobierno que ejercemos hoy no son nuestras, las ejercemos solo porque nos permite el Gobierno norte-americano ejercerlas. El Gobierno norte-americano puede retirarlas de nosotros en cualquier momento; pero cuando redactamos la Constitucion, las facultades que ejerzamos, ningun gobierno norte-americano no los podra quitar. [7]

Under such a theory of limited sovereignty, what kind of constitution could the people adopt? Roxas was emphatic that the Tydings-McDuffie Law did not grant authority for the drafting of a constitution for the Republic. He saw authorization only for the drafting of a constitution for the Commonwealth.

> I have serious doubts, Mr. President, whether in accordance with the principles I have already stated regarding the limited powers of this Convention, we can adopt any other Constitution than the Constitution for the Commonwealth of the Philippine Islands. Section 1 is very clear. This Constitutional Convention has been convened to adopt and formulate a Constitution for the government of the Commonwealth of the Philippine Islands. I want to call your attention to the fact that the word "Commonwealth" is capitalized. The word is not used in its generic sense; it has been used as a substantive noun, as a part of the name given to the political entity

[6] *Ibid.*

[7] *Id.* at 224.

that will be created as the result of this Constitution. [8]

The only way left open by the Tydings-McDuffie Law was, according to Roxas, for the Philippines to adopt:

> A Constitution for the Commonwealth of the Philippine Islands and attach to that Constitution an ordinance stating "upon recognition of the Philippine independence and the final and complete withdrawal of American sovereignty over the Philippine Islands, the Philippine Commonwealth shall become the Republic of the Philippine Islands and the Constitution of the Philippine Commonwealth shall become the Constitution of the Republic of the Philippine Islands. . . ." [9]

In Roxas' view, therefore, the task before the convention was to draft a constitution complete in itself and to append to it an ordinance which would set the same constitution in motion as the constitution of the Republic upon attainment of complete independence. This, basically, too, was the intent of the Osias resolution; and, although Roxas was strong in his disvowal of authority to draft a constitution *directly* for the Republic, his proposed ordinance would attain the same end *indirectly*. On interpellation by Delegate Aruego, he remarked: "I do not believe we have a choice. . . . I think as a practical proposition, we have only one choice, and that is to adopt a constitution for the Commonwealth whose life will extend to and beyond [sic] the period of our Republic." [10]

The battle-cry raised against any attempt to draft a constitution for the Republic, directly or indirectly, was "Usurpation". [11] The most orderly presentation of the case against Roxas' theory of sovereignty was presented by Delegate Vicente Francisco, a prominent Manila lawyer, on August 31, 1934. After a brief summary of the political history of both the United States and of the Philippines, he continued thus:

> A la pregunta de si esta Convencion esta autorizada a redactar la Constitucion de ambos gobiernos . . . mi contestacion es que no lo esta por las siguientes razones: primera, porque la Ley Tydings-McDuffie expresamente provee que esta Convencion redactara y formulara una Constitucion para el Gobierno del Commonwealth; segunda, porque dicha ley requiere que la Constitucion que esta Asamblea ha de redactar debera someterse a la aprobacion del Presidente de los Estados Unidos; y tercera, porque Filipinas no es un estada soberano, sino dependiente de los Estados Unidos, y como

[8] *Id.* at 222.

[9] *Id.* at 221-222.

[10] *Id.* at 226.

[11] See *e.g. id.* at 243-244.

> tal, no esta capacitada constitucionalmente para redactar la Constitucion de la Republica de Filipinas. [12]

The first point raised by Francisco was the one admitted by Roxas himself because of the provision of Section 1 of the Independence Law: "The Philippine Legislature is hereby authorized to provide for the election of delegates to the Constitutional Convention . . . to formulate and draft a Constitution for the Government of the Commonwealth of the Philippine Islands . . ." The second point, besides its legal weight, was fraught with potentiality for emotional explosion. Francisco declared:

> Señor Presidente, no se puede concebir, siquiera remotamente, que haya sido la intencion del Congreso de los Estados Unidos autorizar al pueblo filipino, por medio de la Ley Tydings-McDuffie, a redactar la Constitucion del Gobierno del *Commonwealth* y la de la Republica de Filipinas, e imponer la condicion de que ambas Constituciones, formuladas en un solo documento, deberan someterse al Presidente de los Estados Unidos para su aprobacion. Y hubiera sido un desdoro para la dignidad de nuestra raza aceptar tal imposicion. [13]

The provisions in question were Sections 3 and 7 of the Tydings-McDuffie Law which required submission of the proposed constitution and of any proposed amendment to it to the President of the United States. [14] Francisco asked: "Que clase de soberania

[12] *Id.* at 259.

[13] *Id.* at 260.

[14] Sec. 3. Upon the drafting and approval of the Constitution by the Constitutional Convention in the Philippine Islands, the constitution shall be submitted within two years after the enactment of this act to the President of the United States, who shall determine whether or not it conforms with the provisions of this act. If the President finds that the proposed constitution conforms substantially with the provisions of this act he shall so certify to the Governor-General of the Philippine Islands, who shall so advise the constitutional convention. If the President finds that the constitution does not conform with the provisions of this act he shall so advise the Governor-General of the Philippine Islands, stating wherein his judgment the constitution does not so conform and submitting provisions which will in his judgment make the constitution so conform. The Governor-General shall in turn submit such message to the constitutional convention for further action by them pursuant to the same procedure hereinbefore defined, until the President and the constitutional convention are in agreement.

Sec. 7. Until the final and complete withdrawal of American sovereignty over the Philippine Islands—

(1) Every duly adopted amendment to the constitution of the government of the Commonwealth of the Philippine Islands shall be submitted to the President of the United States for approval. If the President approves the amendment or if the President fails to disapprove such amendment within six months from the time of its submission, the amendment shall take effect as a part of such constitution.

seria la del pueblo filipino, si la Constitucion de su Republica tuviera que someterse a la aprobacion de un pais extraño? De que soberania podriamos vanagloriarnos, si no podemos siquiera enmendar la Constitucion de nuestra Republica sin el sello de aprobacion del President de los Estados Unidos?" [15] Those who felt with Francisco on this point were not soothed by the fact that, as Roxas pointed out, the original provision of Section 3 had been amended to remove the power of the President "to approve or disapprove" the Constitution and to give the President power merely to "certify" to the substantial compliance with the Independence Law. [16] As Delegate Guevara pointed out, "ese cambio fue solamente con el fin de evitar herir la susceptibilidad del pueblo filipino." [17] It is noteworthy, moreover, that Section 7 still required Presidential "approval" of any amendment to the Constitution.

Francisco's final point was to refute Roxas' assertion that the grant of power to adopt a constitution was a grant of sovereignty. He said:

> Esto es pura teoria y sus sostenedores parece que se empeñan en cerrar los ojos a la realidad. No quieren reconocer el hecho de que Filipinas es un pueblo dependiente de los Estados Unidos y sometido a su soberania y que, como tal, no esta joridicamente capacitada esta Convencion para redactar la Constitucion de la Republica Filipina, la cual debe dimanar directamente del pueblo filipino en el ejercicio de su ilimitado poder soberano. [18]

He then proceeded to enumerate the limitations under which the Philippine government must labor. [19] Moreover, to Roxas' argument that the power given by the Tydings-McDuffie Law was to adopt a "constitution" in the American sense, Francisco answered by citing Cooley's definition of a constitution as "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised," and by asking whether this in truth was the type of constitution the Tydings-McDuffie Law, with all the limitations it imposed, authorized. [20] He then concluded this portion of his argumentation thus:

> Tenemos, por tanto, que el pueblo filipino no posee la libertad de redactar una Constitucion que sea la expresion de sus ideales politicos en el ejercicio de su poder de soberania, sino una Constitucion del agrado de los Estados Unidos, o mejor dicho, una Constitucion tal como quiere dicho Congreso que sea. [21]

[15] 1 J. PHIL. CONST. CONV. 260 (1961).
[16] *Id.* at 246.
[17] *Id.* at 247. See also the strong words used by *e.g.* Delegate G. Reyes, *id.* at 245.
[18] *Id.* at 260-261.
[19] *Id.* at 261.
[20] *Ibid.*

PROBLEMS OF STATUTORY CONSTRUCTION

Perhaps, all this debate on the level of constitutional theory could have been avoided if the text of the Independence Law itself had said in categorical terms that the convention was to draft a constitution for the Republic. The delegates would probably have disagreed with such authorization on a theoretical level, but as a matter of practical necessity and in their eagerness to draw nearer to independence, they might have kept quiet about it. But, as a matter of fact, the text was ambiguous. To begin with, the proponents of the Osias resolution pointed out that the title of the Independence Law was not restrictive: [22] "An Act . . . to provide for the adoption of a *Constitution for the Philippine Islands.*" But the opponents were quick to counter that the title must yield to the terms of Section 1 which authorized a constitutional convention "to formulate and draft a constitution for the government of the Commonwealth of the Philippine Islands." Moreover, Delegate Sanchez pointed out that in statutory construction the creation of privileges must be strictly construed. [23] And to bolster the argument from Section 1, the opponents of the resolution pointed to Section 7 which provided that "Every duly adopted amendment to the *Constitution of the government of the Commonwealth of the Philippine Islands* shall be submitted to the President of the United States for approval." [24] But the proponents of the resolution, refusing to be tied down by Section 1, considered it not limiting but merely "descriptive," [25] whatever that meant, and anchored their statutory arguments chiefly on Sections 2 and 10 of the Independence Law.

The initial argument was offered by Delegate Osias himself. [26] He saw in the provisions of Section 2 the implication of clear authorization for a constitution for the Republic. The key provisions follow:

> Sec. 2. (a) The constitution formulated and drafted shall be republican in form, shall contain a bill of rights, and shall, either as a part thereof or in an ordinance appended thereto, contain provisions to the effect that, pending the final and complete with-

[21] *Id.* at 262.
[22] *Eg.*
[23] *Id.* at 205.
[24] *Ibid.*
[25] *Id.* at 314.
[26] *Id.* at 201.

drawal of the sovereignty of the United States over the Philippine Islands —

. . . . . .

(b) The constitution shall also contain the following provisions effective as of the date of the proclamation of the President recognizing the independence of the Philippine Islands, as hereinafter provided:

. . . . . .

(2) That the officials elected and serving under the constitution adopted pursuant to the provisions of this act shall be constitutional officers of the free and independent government of the Philippine Islands and qualified to function in all respects as if elected directly under such government, and shall serve their full terms of office as prescribed in the Constitution.

Delegate Aruego summarized the heart of the argument thus:

> If the intention of the Congress of the United States was to allow us to frame a Constitution only for the Commonwealth, what is the reason for including in Sec. 2 of the Independence Law the phrase, "pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands?" Why did not the law simply command that the Constitution should contain matters covered in the mandatory provisions? Why did the Congress of the United States include in Sec. 2(b) the phrase "effective as of the date of the proclamation of the President recognizing the Independence of the P.I.?" It must have been to give us freedom to choose whether the Constitution that we shall frame will be for the Commonwealth only or both for the Commonwealth and the Republic provided that the mandatory provisions are duly attended to.[27]

Others, like Roxas, also emphasized the force of Section 2(b)2.[28]

Section 10 deals with the recognition of Philippine independence and withdrawal of American sovereignty. It runs in part:

> Sec. 10. (a) On the 4th of July immediately following the expiration of a period of ten years from the date of the inauguration of the new government under the constitution provided for in this act the President of the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty . . . and . . . shall recognize the independence of the Philippine Islands as a separate and self-governing nation and acknowledge the authority and control over the same of the government instituted by the people thereof, under the constitution then in force.

[27] *Id.* at 232.

[28] *Id.* at 223. See also Joven, *id.* at 314; Orense, *id.* at 203.

For the proponents of the Osias resolution the "constitution then in force" would have to be no other than the constitution which the convention was in the process of drafting.[29]

Inevitably, the opponents of the resolution had a different view of Sections 2 and 10. We have already seen that, for Francisco, Section 2 and all the limitations it embodied meant a denial of sovereignty and consequent incapacity to formulate a constitution for a sovereign nation. For the opponents, therefore, Section 2 merely performed the function of extending the life of the Commonwealth Constitution temporarily and provisionally pending such time as the Republic was able to draw up a constitution of its own.[30] It was pointed out, moreover, that Section 2(b)5, which provided for the embodying of the provisions in Section 2(b)1, 3 and 4 in a treaty, was a recognition by the United States Congress that after independence the Commonwealth constitution would continue only as a transitional constitution. Else, why require the further assurance of a treaty?[31] As to the argument from Section 10, not much could really be made of it because the section was equally open to the interpretation that another constitution would then be in force. Moreover, the opponents of the resolution argued that Section 10, like Section 2, merely provided for an orderly transition pending the adoption of a constitution for the Republic.[32]

What the Convention Did

After a few days of debate, the main lines along which the legal arguments would be fought had been clearly drawn. It had become evident, however, that there was no hope for an open reconciliation of the opposing sides. The arguments were, on the whole legal, but there were colorations along lines of practical necessity and national honor. Not a few were repelled by the spectre of a "Roosevelt constitution" saddling an independent republic.[33] Others did not wish to rob the future republic of the honor of initiating a constitution instead of merely amending or reforming a borrowed one.[34] The opening remarks of Claro M. Recto, President of the Convention, did not fall on arid ground. Recto had said:

> Me hago cargo, señores Delegados, de las muchas y no pequeñas dificultades que tendremos que vencer en el desempeño de nuestras tareas. Por un lado, tenemos la realidad inexorable, superior

[29] *E.g.*, *id.* at 203.

[30] *E.g.*, Sanchez, *id.* at 205; Guevara, at 257; Francisco at 262.

[31] *Id.* at 233. Cf. *id.* at 347.

[32] *E.g.*, *id.* at 205.

[33] *E.g.*, *id.* at 245.

[34] *E.g.*, *id.* at 204.

a todos los supuestos y a todas las teorias, de que la Constitucion que vamos a preparar no es aun la de un pueblo libre para uso de un pueblo libre, y de que no es todo lo amplio que fuere de desear el campo en que hemos de movernos para una cabal formulacion de nuestros planes; por otro lado, parece cierto que muchos de nosotros se sienten impulsados por el afan, que encuentro logico y explicable, de que el documento historico que ha de salir de nuestras deliberaciones no solo sea fruto de nuestras bellas teorias de gobierno sino tambien que sea como un sagrado deposito en que se recojan y hallen expresion todas las ansias, todas las inquietudes, todas las emociones del alma popular, y lo hariamos sin duda, es decir, escribiriamos ese ideal Magna Carta, si nuestra patria fuese ya soberana de su albedrio y duena de sus destinos. [35]

In the midst of the division in the house, not a few lamely argued that the resolution was unnecessary because the provisions of the Independence Law were sufficiently clear. [36] The committees, meanwhile, were silently working on the preliminary drafts that would be submitted to the convention floor.

On September 15, 1934, the debate took a curious turn when a group of delegates submitted the following "amendment by substitution" to the Osias resolution:

RESOLUTION EXPRESSING THE SENSE OF THE CONSTITUTIONAL CONVENTION THAT THE PROVISIONS OF THE TYDINGS-MCDUFFIE LAW ARE CLEAR AND DEFINITE AS TO THE NATURE AND SCOPE OF THE CONSTITUTION TO BE DRAFTED.

Resolved, That it is the sense of the Constitutional Convention, after hearing the arguments adduced by the speakers for and against the P.R. No. 60 that, inasmuch as the provisions of the Tydings-McDuffie Law are clear and definite as to the nature and scope of the Constitution which this Convention is authorized to draft, the taking of a vote on the P.R. No. 60 is unnecessary.

The Osias forces fought the attempt to give preferential treatment to the discussion of this resolution which was obviously intended to have the effect of tabling the original resolution. They failed, [38] But so did the amendment by substitution. Instead, on September 19, 1934, Delegate Elpidio Quirino, later to become the second President of the Philippine Republic, presented a motion to postpone indefinitely all debates on the Osias resolution and on all related resolutions. The motion was carried and thus died the Osias resolution. [39]

[35] *Id.* at 22.
[36] *E.g.*, at 201.
[37] *Id.* at 412.
[38] *See id.* at 412-416.
[39] 2 J. PHIL. CONST. CONV. 438-444 (1962).

When the constitution finally reached its final form, it carried Article XVII (now XVIII) entitled "The Commonwealth and the Republic." The Article reads: "Section 1. The government established by this Constitution shall be known as the Commonwealth of the Philippines. Upon final and complete withdrawal of the sovereignty of the United States and the proclamation of the Philippine independence, the Commonwealth of the Philippines shall thenceforth be known as the Republic of the Philippines." It is noteworthy that, whereas in other respects this article follows closely the ordinance suggested by Roxas, [40] unlike the Roxas ordinance the article says nothing about the Constitution of the Commonwealth becoming the Constitution of the Republic. The Article seems to be the result of a compromise because it is one of the substantial changes inserted by the Special Committee on Style, a body composed of both proponents and opponents of the Osias resolution, into the final draft of the constitution. [41]

Whatever may be the meaning of Article XVII in its final and popularly ratified form, some questions still remain unanswered. First, did the United States Congress in fact intend to authorize the convention to draft a constitution for the Philippine Republic? Second, under American constitutional theory, could Congress have given such authorization? In other words, to use an analogy, what would the constitutional theoreticians of colonial America have said if the English government had passed a law, prior to the Declaration of Independence, authorizing the American people to draft a constitution for an independent America but with certain limitations and subject to scrutiny and approval by royal authority? Third, is the present Philippine constitution a permanent constitution or is it merely a transitional document still awaiting final action by the sovereign Republic?

THE "MIND" OF CONGRESS

In order to understand the mind of the Independence Law, it is necessary to look at it not isolatedly as an empowerment to draft a constitution but as a structured plan to grant independence to the Filipinos. The Tydings-McDuffie Law was the second of the kind to be passed by the United States Congress, the first being the Hare-Hawes-Cutting Law [42] which, after being vetoed by President Hoover, was repassed by Congress. [43] The Hare-Hawes-Cutting

[40] See *supra*, p. 6. Sec. 2(b) of the Tydings-McDuffie Law became Article XVI of the Constitution and Sec. 2(a) was made into an ordinance appended to the constitution.
[41] See 2 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 684-678 (1937).
[42] Act Jan. 17, 1933, ch. 11, s 1, 47 Stat. 761.
[43] 76 CONG. REC. 1924 (1933).

Act, however, stipulated in Section 17 that the "act shall not take effect until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon that question as may be provided by the Philippine Legislature." [44] The Hare-Hawes-Cutting Act was not accepted: consequently, a new law, the Tydings-McDuffie Law, which also contained an acceptance clause, was passed and was accepted by the Philippine Legislature. [45] Except for a few minor differences, however, which need not be inquired into for the purpose of this paper, the second law was substantially a copy of the first. [46] Hence, the congressional discussion of the original law is directly pertinent to a proper understanding of the subsequent one.

The Report of the Senate Committee on Territories and Insular Affairs favorably reporting the bill S. 3377 (Hawes-Cutting bill) said: "Only two questions require decision — first, " 'When shall the Philippines be granted independence?' and, second, 'How should it be granted, so as to protect both Philippine and American welfare?' " [47] The answer to the first question was that Independence was to eventuate on the 4th of July immediately following the expiration of a period of ten years from the date of the inauguration of the Commonwealth of the Philippines. The answer to the second question was that independence would be achieved through the machinery established by the Independence Law and accepted by the Philippine Legislature. The machinery was left in the hands of the Filipinos. Having accepted the terms of the law, they were to call a convention, draft and ratify a constitution for the Commonwealth government, establish this semi-sovereign government, and then independence would become a certainty at the end of a ten-year period without need for any additional congressional action. [48]

Within this structured growth toward independence, what constitution did Congress intend to authorize: one for the Commonwealth only or one for both the Commonwealth and the Republic? Posed thus, the question does not seem to have an answer within the four corners of the Independence Law. One searches in vain for a categorical answer to this question either in the Hare-Hawes-Cutting Law or in the Tydings-McDuffie Law. The ambiguities of the

[44] See Memorandum prepared by Hon. Benigno S. Aquino, Envoy of the Philippine Legislature, 76 CONG. REC. 1098-1099 (1933), and Concurrent Resolution of the Philippine Legislature informing Congress of the rejection of the Hare-Hawes-Cutting Act, 78 CONG. REC. 5011 (1934).

[45] N.Y. Times, May 2, 1934, p. 1, col. 7.

[46] See 78 CONG. REC. 4841 (1934).

[47] 75 CONG. REC. 12817 (1932), reprinted from the Sunday Tribune, Manila, July 30, 1933.

[48] *Id.* at 5146.

Tydings-McDuffie Law brought to light in the course of the convention debates were ambiguities inherited from the Hare-Hawes-Cutting Act. The reason for these ambiguities seems to be that the legislators never asked themselves the question. They were immediately interested in fixing the date for independence and in establishing a transitional and probationary government. They assumed that, after the acceptance of the Independence Law, independence would be a certainty (although talk about possible statehood did not totally stop even after the constitution would be in effect at the time of the inauguration of the Republic). [49] And it is impossible to suppose that such constitution could be anything else than one drafted under authorization of the Independence Law or some other similar law. What they did not assume was that this constitution would be totally satisfactory to the newly independent nation and that it would not be radically revised or amended. This they could not assume with any absoluteness, although political facts would have indicated to them that the Filipinos would persevere under a republican form of government and with a bill of rights in accordance with the wishes of Section 2(a) of the Independence Law. [50]

It will perhaps be pointed out that the defeat of substitute bills presented by Senator Vandenberg of Michigan and of Senator King of Utah, bills which sought to authorize the Philippines "to formulate and draft a constitution *for an independent government of the Philippines,*" was a clear indication of the mind of Congress to authorize a constitution only for the Commonwealth or the Philippines. But this particular clause authorizing a constitution for an independent Philippines was not the reason for the rejection of the Vandenberg and King bills. The differences between the majority position and the Vandenberg and King positions were more basic. Vandenberg's original bill, presented in the course of the debates on the Hawes-Cutting bill, in the words of Vandenberg:

> provides for the constitution at the end of the period [of probation] on the theory, first, that American authority must continue as long as American responsibility continues; and, second, that the native constitution is logical only as the climax rather than as the inception of the probation. . . . It seems to me that it is vital in a correct philosophy of action that the existing structure of Philippine government should not be fundamentally changed to fit the prospectus of a subsequent republic until the economic probation is completed and until the native decision for an ultimate republic is made and the republic is ready to function. Otherwise we have the cart before the horse. . . . [51]

[49] N.Y. Times, April 21, 1935, s 4, p. 12, col. 2; *id.*, May 10, 1935, p. 6, col. 3.

[50] See 1 ARUEGO, *op. cit.* at 95 (1936).

[51] 75 CONG. REC. 12833 (1932).

The scheme, therefore, besides its provision for twenty years' wait before granting independence, was totally contrary to the desire of the Hawes-Cutting bill to increase autonomy of the government during the probation period.[52] Vandenberg himself abandoned this scheme, and in the course of the debates on the Tydings-McDuffie bill, offered another bill. This time he followed the lines set by a substitute bill presented by Senator King. Both the King substitute[53] and the new Vandenberg substitute[54] essentially asked for immediate independence to be followed by a post-independence period of economic readjustment. This was the reason for the rejection of the King and Vandenberg substitutes.

But what of Section 2(b)5 of the Tydings-McDuffie Law, the provision for the embodiment of the contents of section 2(b) in a treaty with the United States? Did this provision for "further assurance" imply an admission on the part of Congress that the constitution which the Philippines would have at the inauguration of the Republic would be merely a transitory document? Such an explanation is possible, but a simpler one seems more plausible. Section 2(b)1, 3 and 4[55] deal with property matters affecting the interests of the United States. Upon the ratification of the constitution and the subsequent taking effect of these provisions, the new government would become bound by these obligations and the effect would be analogous to being bound by treaty obligations. The "further assurance" of a treaty would merely formalize these obligations as treaty obligations. The provision is perfectly understandable when one realizes that the matters covered by Section 2(b)1, 3 and 4 are matters more properly belonging to a treaty and not to a constitution. Hence, if one must speak of transitoriness, it is perhaps legitimate to say that Section 2(b) 2, 3 and 4 had a transitory place in the constitution pending the formulation of a treaty agreement. This transitoriness need not color the entire document.

[52] See analysis of the Vandenberg bill by Mr. Hawes, *id.* at 12841-12843.

[53] 78 CONG. REC. 5004 (1934). King had also offered a similar substitute bill as amendment to the Hawes-Cutting bill, 76 CONG. REC. 634 (1933).

[54] CONG. REC. 4990-4991 (1934).

[55] Sec. 2(b) The constitution shall also contain the following provisions, effective as of the date of the proclamation of the President recognizing the independence of the Philippine Islands, as hereinafter provided:

(1) That the property rights of the United States and the Philippines shall be promptly adjusted and settled, and that all existing property rights of citizens or corporations of the United States shall be acknowledged, respected and safeguarded to the same extent as property rights of citizens of the Philippine Islands.

(3) That the debts and liabilities of the Philippine Islands, its provinces, cities, municipalities, and instrumentalities, which shall be valid and subsisting at the time of the final and complete withdrawal of the sovereignty of the United States, shall be assumed by the free and independent government of the Philippine Islands; and that where bonds have been issued under authority of an act of Congress of the United States by the Philippine Islands, or any province, city, or municipality therein, the Philippine government will make adequate provision for the necessary funds for the payment of interest and principal and such obligations shall be a first lien on the taxes collected in the Philippine Islands.

(4) That the Government of the Philippine Islands, on becoming independent of the United States, will assume all continuing obligations assumed by the United States under the treaty of peace with Spain ceding said Philippine Islands to the United States.

A QUESTION OF SOVEREIGNTY

The next question for consideration is whether it was within the power of the United States Congress to prescribe the kind of constitution an independent nation should have. The question can be formulated in different ways. Does not the very idea of requiring Presidential approval (euphemistically called "certification") run counter to the idea of "self-determination" which underlay American policy towards the Philippines? Could a non-sovereign or semi-sovereign Filipino people formulate a constitution that would permanently bind a fully independent Philippine republic? In grappling with this question, it was inevitable that the convention delegates, working with concepts of American constitutional theory, should hark back to the early beginnings of American constitutionalism. The opponents of the Osias resolution pointed out the Federal Constitution was what it was because it was the product of a fully sovereign people who had declared themselves independent of the English power.[56] On the theory therefore that a constitution is the solemn expression of the sovereign will of the people, the Filipinos were in no position to adopt a constitution similar in stature to that of the Federal Constitution and, for that matter, it was improper for the United States Congress to dictate what the sovereign will should be. The fact, however, was that the United States, in their capacity, first, as conquerors and, second as tutors in the ways of constitutional democracy, did lay down the terms under which the Philippine constitution should be framed. The conclusion seems inevitable that the United States Congress was not thinking in terms of a constitution as fully untrammeled as that framed by the Philadelphia convention. What then is the model of the constitution authorized by the Independence Law?

To answer this question it is necessary to go back to the Independence Law, particularly, to Section 17, the acceptance clause, which reads as follows: "The foregoing provisions of this act shall

[56] 1 J. PHIL. CONST. CONV. 258-259 (1961).

not take effect until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon the question as may be provided by the Philippine Legislature." Explaining the origin and purpose of this provision, the Report of the Philippine Independence Commission said:

> Practically every enabling act approved by the American Congress to authorize the people of a Territory to institute a government preparatory to its admission as a State of the Union contains a provision substantially identical with section 17. . . .
>
> . . . This provision was first suggested during the discussion of the Hawes-Cutting bill by the committee of the Senate. It was urged that, in view of the relatively long institutional process leading to the adoption of the constitution, it was necessary, on the one hand, to impose a moral obligation on the American Congress not to change the provisions of the act while the different institutional steps were being taken; and, on the other hand, to obtain an expression by the representatives of the Filipino people approving these different steps as a proper and satisfactory proceeding looking to the adoption of the constitution.
>
> Section 17, together with section 4 and other provisions of the act, inaugurate for the Philippine Islands a new policy, that of mutuality and voluntary relationship. These provisions recognize for the first time the right of the Filipino people to determine by their free choice whether or not they shall accept a relationship proposed by Congress. [57]

There is ample evidence therefore that the American model was state constitutionalism.

What then is a state constitution and what are its attributes? The question was asked in *Frantz v. Autry* in a case involving the Oklahoma Constitution, a constitution formulated for the Oklahoma and Indian Territories in virtue of an enabling act. The court answered:

> Judge Story . . . declares: "The true view to be taken of our state constitutions is that they are forms of government ordained and established by the people in their original sovereign capacity to promote their own happiness and permanently to secure their rights, property, independence, and common welfare." Judge Cooley . . . says: "In considering state Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of law, nor the incipient state of government. It is not the cause but consequence of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience. [58]

[57] 78 CONG. REC. 5153 (1934).

The court went on further, and distinguished state constitutions from the Federal Constitution saying that whereas the latter is a grant of powers, the former is not a grant but an apportionment and restriction of inherent powers. [59] And speaking of the powers of a constitutional convention called under an enabling act, the court said:

> In a territory, the source of all power is Congress. But in the formation of a constitution and state government the power emanates from the people. The delegates to the convention were not the agents or representatives of Congress, but they were the immediate representatives of the people of the two territories. They derived their power and authority from the people in their sovereign capacity. . . . In Benner v. Porter, 9 How. (U.S.) 242, 13 L.Ed. 119, the Supreme Court of the United States, in speaking of the sources of power, with reference to the admission of the territory of Florida, said: "The convention being the fountain of all political power, from which flowed that which was embodied in the organic law, was, of course, competent to prescribe laws and appoint the officers under the Constitution, by means whereof the government could be put into immediate operation." The convention, therefore, was created by the direct action of the people, and in the discharge of its powers, duties, and obligations it performs one of the highest and most important acts of popular sovereignty. . . . [60]

Yet, with all these affirmations of sovereign power, one must not overlook the fact that state constitutional conventions are always subject to the Constitution of the United States, and the limitations and restrictions contained in the enabling act. [61]

Can all of what has been said be applied to the constitution authorized by the Independence Law? It seems that an important difference should not be overlooked, namely that the enabling act for Oklahoma and for similarly situated territories was for a constitution for a political body that would become a part of a larger union. It was therefore perfectly understandable that the larger political body should lay down the terms for membership within the union. The situation of the Philippines was different.

[58] 18 OKLA. R. 561, at 593 and 595 (1907), 91 PAC. 193 at 204.
[59] *Id.* at 612-616, 91 PAC. at 209-213.
[60] *Id.* at 589-590, 91 PAC. at 202-203.
[61] 91 PAC. 210.

Tydings-McDuffie Law was a step not towards admission into the union but towards independence. The legal interest (other than treaty relations), therefore, which Congress would have in the Philippine constitution necessarily had to be limited to the period prior to independence. The immediate object of the limitations laid down in the Independence Law, as far as the constitutional structure of the Philippine government was concerned, was that the transition towards independence should assure stability for the Philippine government of the future. This the United States was bound to do in their capacity as tutors. There was, of course, nothing to prevent them from hoping that, after ten years of experimentation, the Filipino people would totally embrace the structure of the Commonwealth government and preserve it as a permanent structure. This, it is submitted, could be the "good reason" for the ambiguity of the terms of the Independence Law as to the life-span of the authorized constitution; the "good reason" for the ambiguity may very well be that the legislators never posed the question in the terms we have explained it. They were thinking in terms of state constitutions.

Another pecularity which should be borne in mind is the provision in the Independence Law for ratification by plebiscite. Section 4 provided that "if a majority of votes cast shall be for the constitution, such vote shall be deemed an expression of the will of the people of the Philippine Islands in favor of Philippine Independence." The first unusual point to be noted about this provision is that the Filipinos would be asked two questions but only one answer could be given for both. The doubling of the question was the result of an amendment offered by Senator Byrnes of South Carolina.[62] Mr. LaFollette expressed the chief criticism of this amendment thus: "[L]et us not be a party to forcing the people of the Philippine Islands to accept perchance a constitution which would violate the entire conception of the type of government which they wished to set up in the islands in order that they may achieve their desire for independence."[63] But the Byrnes amendment was approved and appeared both in the Hare-Hawes-Cutting Law and in the Tydings-McDuffie Law. Manuel L. Quezon, the foremost Filipino leader of the period, made an issue of this phraseology when it appeared, asserting that it virtually coerced a favorable vote on the Constitution. Manila editors likewise called attention to the fact that under this arrangement it was impossible for any person to express disapproval of the constitution without committing oneself against Philippine independence. At the time of the plebiscite, however, the issue was no longer raised and the document in the main was satisfactory

[62] 76 CONG. REC. 612 (1933).

[63] *Id.* at 616.

to political leaders.[64] One wonders, however, why precisely it was satisfactory to political leaders. Perhaps, one clue to the answer may be found in a concurring opinion in *Tavora v. Gavina* penned by J. Perfecto, a former delegate to the Constitutional Convention:

> The draft, as transferred to the Committee on Style, already embodied several provisions of the Tydings-McDuffie Act. Still concerned with the idea of insuring the approval of the President of the United States of America, the Committee on Style, composed of the most representative members of the Convention, including some of the foremost leaders of the two dominent political parties of the country, both committed to the platform of securing our national independence, added to the text many other provisions taken from the Tydings-McDuffie Act, so as to drive in the mind of President Roosevelt the conviction that none of the conditions imposed by the Tydings-McDuffie Act may remain unfulfilled. We wanted to be sure that the Constitution should come into effect and that upon the termination of the ten-year transitory period our national independence shall be proclaimed. The complete success of the political aims of the Constitutional Convention is borne out by the events of more than one decade of our national history.[65]

This fact of the dubious one-mindedness of the ratification of the Philippine Constitution somewhat weakens the argument that the Filipinos of 1935, although not fully sovereign, could nevertheless bind the future Republic because the Filipinos of 1935 and the Filipinos of the Republic were one and the same political entity.[66]

DOES THE PHILIPPINE REPUBLIC HAVE A CONSTITUTION?

The obvious conclusion to be drawn from this preliminary survey is that there is no perfect parallelism between the genesis of the Philippine Constitution and that of either the Federal Constitution or the state constitutions. But can it be said that the present Philippine Constitution does not have the legal stature of permanence which American constitution have? There is no question at all that the Filipino people, when they first adopted their Constitution in 1935, were not in the same position as the Americans were at the time of the Philadelphia convention. Neither were they in the same position as the American territories in the process of preparing for admission into the Union. There was,

[64] N.Y. Times, May 13, 1935, p. 10, col. 1-2; id. at April 28, 1935, s 4, p. 5, col. 5.

[65] 79 Phil. 421, at 437-438 (1947).

[66] 1 J. PHIL. CONST. CONV. (1961). Cf. also U.S. cases saying that a change in the state constitution does not change the state, e.g. Keith v Clark U.S. 454 (1878).

moreover, the political fact that more than anything else, the Filipinos were determined on obtaining independence as soon as possible and there is evidence to show that they and their leaders were willing to sacrifice the quality of their constitution in exchange for the assurance of independence. Moreover, Article XVII (now XVIII), although it is not explicit on the matter, leaves the impression that the constitution of the Commonwealth would also be the constitution of the Republic. One hesitates, however, to say that an *ultra vires* act was committed both by the delegates, when they ratified the constitution containing such article. It does seem vain and futile to look for exact parallelism between the Philippine Constitution and American constitutions. Historical and political facts prevent such parallelism. Nevertheless, the essential American institution of a constitution coming into being as the will of the sovereign people is there.[67] True, in the case of the Filipinos, it was a fettered will, a necessary consequence of conquest. But the fetters, for the moment, at least were consented to rather than enter into a bloody conflict for which the people had neither the inclination nor the capability. The mistake was in so soon committing the future Republic, if, indeed, Article XVII was a commitment, to a definite constitution born under inauspicious circumstances. A wiser move, perhaps, would have been a provision for total review of the constitution, in the light of past experience, soon after the attainment of independence. A definite mandate for review would have created a deeper sense of alertness and experimentation, for the Commonwealth was an experiment.[68]

It should be noted, however, that the Commonwealth was in the mood for experimentation. Evidence for this was the 1940 amendment transforming the unicameral National Assembly into the present bicameral Congress and raising the Commission on Elections to a constitutional stature. Moreover, there was really nothing in the legal order to prevent the young nation from instituting a general review of the constitution after attaining independence. The constitution provided for an amendatory process.[69] But there were considerations other than legal. In the first place, almost half of the Commonwealth period was spent under Japanese occupation. Secondly, when independence finally came in 1946, the Philippines was a badly battered nation. The immediate post-war preoccupation was recovery and reconstruction. Finally, even while the process of rebuilding was going on, the *Hukbalahaps* became a serious threat to national security. Under

[67] See *Brodett v de la Rosa* 77 PHIL. 752 (1946).

[68] From the very start, the convention was expected to be very conservative in accordance with the wishes of both Quezon and Osmeña. N.Y. Times, Aug. 12, 1934, sec. 4, p. 8, col. 2.

[69] Article XV (now XVI).

these conditions, the young Republic did not have the time to think of reviewing the constitution.

Finally, suppose that the act of the convention, in formulating Article XVII, and the act of the people, in ratifying it, were really *ultra vires*. Has this legal defect, if legal defect it is, been cured? It must be remembered that Philippine constitutional theory is in essence American; hence, the general principles of American constitutionalism are applicable. The fact, therefore, that the end product of the convention was controlled largely by the provisions of the Independence Law could not, by itself, engender a fatal defect. In the words of *Brittle v. People*: "To say that the people of the territory must frame — that is, write out — their constitution in the first instance themselves is not correct. The document might be imported from Japan or fall from the clouds . . ."[70] The essential requisite is that the document be accepted by the people. And even if the acceptance is defective, subsequent acts of the state can cure the defect.[71]

It is submitted that subsequent acts of the Republic have cured whatever legal defects the constitution may have had. In the first place, the amendatory process of the constitution was used soon after the grant of independence to grant Americans equal rights with Filipinos in the exploitation of the natural resources of the country.[72] The amendment as passed was an amendment to the constitution *of the Republic*. Secondly, every two years since independence, national elections have been held under the constitution. Finally, numerous litigations involving the constitution have been decided by the Supreme Court.[73]

[70] 2 NEBRASKA 198, 217.

[71] *E.g.*, Secombe v Kittlesen 12 NW 519, 522 (1882).

[72] The amendment was ratified in a plebiscite on March 11, 1947. See Ordinance appended to the Constitution pursuant to resolution of September 18, 1946, of the First Philippine Congress, 1 PHIL. ANN. LAWS 30 (1956).

[73] In one case involving the continuing validity of the tenure of a judge appointed under the Commonwealth, the Court offered this interpretation of Article XVII:

"Petitioners . . . seem to insinuate that ,because Judge de la Rosa was appointed under the Commonwealth Government, the authority of his appointment is not derived from what they call the 'Constitution of the Republic of the Philippines,' implying that the Republic has its own constitution separate and independent from the Constitution in effect during the Commonwealth. The theory is wrong. The theory under which the Republic exists and is functioning is but the same under which the Commonwealth existed and has been functioning. The Convention drafted the 'Constitution of the Philippines,' the title it gave to the document, for both the

CONCLUSION

The legal conclusion we have arrived at is significant because of the effect it can have in the practical order. More and more often, national leaders are raising their voices to call for a re-examination of the "colonial" constitution. But if the "colonial" constitution has, in effect, been de-colonized by subsequent acts of the Republic, the advocates of general review cannot now rely on a general subsisting mandate for change concommitant to the transition from Commonwealth to Republic. They will have to rely on specific arguments for change in order to prod Congress into setting the amendatory process in motion. This mountainous barrier could have been avoided if the convention delegates had embodied in the constitution a specific call for general review. But, then the question really is, is a general review necessary now? It is submitted that the need for review is at least psychological. The Filipino people are at present engaged in an intensive search for national identity. The search can be helped by the removal of the "colonial" cloud of doubt that hangs over the present Constitution.

Commonwealth and the Republic as can clearly be seen in Article XVIII [formerly XVII] . . ." (Perfecto, J. in *Brodett v. de la Rosa;* 77 Phil. 752, 757-758; also Feria, J. concurring at 760.) This statement of the Court, however, is not incompatible with a transitional concept of the 1935 Constitution considering that the statement was made in 1946, which definitely formed part of the transition period.

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